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Nos. 04-1528
(Consolidated with Nos. 04-1530 and 04-1652)

IN THE

# Supreme Court of the United States

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NEIL RANDALL, *et al.*,
*Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## INTEREST OF *AMICUS* [1]

The Democratic National Committee ("DNC") is an unincorporated association that is the governing body of the Democratic Party of the United States and is the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971 as amended. 2

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

U.S.C. § 431(14). The DNC actively supports Democratic candidates in federal, state and local elections throughout the nation and is subject to federal and state campaign finance laws including, in the case of Vermont, Vermont's Act 64. The current national chair of the DNC is Howard Dean, M.D., who served as Governor of Vermont from 1991 to 2003 and, as the State's Governor, signed Act 64 into law in 1997.

Pursuant to Sup. Ct. R. 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk.

## SUMMARY OF ARGUMENT

1. *Buckley v. Valeo*, 424 U.S. 1 (1976) did not foreclose the possibility that campaign expenditure limits could survive the "exacting scrutiny" test, if the government could show that such limits serve compelling governmental interests, not considered in *Buckley*, and are narrowly tailored to serve those interests.

2. Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and candidate expenditures. The candidate expenditure limits serve two fundamental and related compelling interests, neither of which was foreclosed by *Buckley*: (i) restoring integrity and faith in the democratic process in Vermont by effectively reducing the significance of private donations as a means of achieving access to and influence over elected officeholders; and (ii) promoting and enhancing access to and participation in the political process by all citizens, regardless of financial means, both as individuals and in association with each other by, *inter alia*, *enhancing* the role of political parties.

3. The second of these interests has an especially significant dimension with respect to the role of political parties. The role of parties has declined since *Buckley* as individual candidates have become entrepreneurs, able to raise and spend unlimited sums of money, making them increasingly

less dependent on party committees. As a result, the historical beneficial role of parties in achieving accountability, consensus and more effective government, has been diminished. Act 64 enhances the role of political parties by leaving them free to expend funds to support the party's message generally and to spend independently in support of their candidates. By restoring this historical balance, parties are in a better position to perform their critical functions of unifying factions in the electorate, enhancing the voice of all citizens in the political process and connecting citizens to their government. Restoring the role of parties in this way is itself a particularly compelling governmental interest.

4. The Court has afforded legislative bodies deference when they make decisions protecting the political process. Such deference is especially warranted in this case. By contrast with the campaign finance regime, for example, considered in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), in enacting Act 64 elected officials have not restricted the spending of *other* participants in the political process, but rather have decided to restrict their *own* spending in order to enhance participation in and access to the political process by their constituents, thereby restoring the faith of ordinary citizens in their democracy. Nor have incumbent legislators used the law to try to protect themselves against challengers. Act 64 likely enhances the ability of challengers because candidates' own spending is reduced significantly; the expenditure limits are actually set higher for challengers; and challengers' supporters, including in particular political parties, have the right to spend unlimited sums independently to promote those challengers.

## I. BUCKLEY DOES NOT FORECLOSE CANDIDATE EXPENDITURE LIMITATIONS THAT ARE PART OF AN INTEGRATED SCHEME NARROWLY TAILORED TO SERVE COMPELLING GOVERNMENTAL INTERESTS

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that "although . . . contribution and expenditure limitations both implicate fundamental First Amendment interests, . . . expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.* at 23. Therefore, the Court ruled, the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The Court proceeded to hold that the limitation imposed on candidate expenditures by the 1974 Amendments to the Federal Election Campaign Act of 1971, 18 U.S.C. § 608(c)(1974), was unconstitutional. *Buckley*, 424 U.S. at 54-58.

The lower court in this case correctly concluded, however, that "Buckley does not permanently foreclose any consideration of campaign expenditure limitations." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). In *Buckley*, the Government asserted, and the Court considered, only three interests: (1) "alleviating the corrupting influence of large contributions;" 424 U.S. at 55; (2) "equalizing the financial resources of candidates competing for federal office," *id.* at 56; and (3) "reducing the allegedly skyrocketing costs of political campaigns . . . ." *Id.* at 57. The Court did not suggest that no government interest that could ever be asserted in a future case could ever be sufficiently compelling to meet the "exacting scrutiny" or "strict scrutiny" test. To the contrary, the Court simply concluded that, "*No governmental interest that has been suggested* is sufficient to justify the restriction on

the quantity of political expression imposed by [the] campaign expenditure limitations." *Id.* at 55 (emphasis added).

The "exacting scrutiny" test prescribed by *Buckley*, for evaluating the constitutionality of expenditure limitations, requires that the government "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 504 U.S. 191, 198 (1992), *quoting Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To be sure, it is difficult to meet that standard, but it is not impossible. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), *quoting Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)(Marshall, J., concurring). Thus, the Court of Appeals correctly held that "Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest." *Landell, supra*, 382 F.3d at 110.

## II. ACT 64'S EXPENDITURE LIMITS SERVE COMPELLING GOVERNMENTAL INTERESTS

Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and expenditures by candidates. The Act limits candidate expenditures in any given two-year election cycle to $ 300,000 for governor; $ 100,000 for lieutenant governor; $ 45,000 for secretary of state, attorney general, treasurer, and auditor; $ 4,000 for state senator, plus $ 2,500 for each additional seat in the relevant jurisdiction; $2,000 for state representative in a single-member district; and $ 3,000 for state representative in two-member districts. Vt. Stat. Ann. Tit. 17 § 2805a(a)(2005). These limits are adjusted for inflation every two years. *Id.* at 2805a(e). In the court below, the State of Vermont asserted that at least five interests are served by the candidate expenditure limits: "(1) 'avoiding the reality and appearance of cor-

ruption . . .'; (2) 'assuring that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties;'" (3) promoting 'electoral competition and protecting equal access to political participation;' (4) 'bolstering voter interest and engagement in elective politics;' and (5) 'enhancing the quality of political debate and voters' understanding of the issues.'" *Landell*, 382 F.3d at 115. Although the Court of Appeals analyzed only the first two of these (anti-corruption and time-saving), the third and fourth interests—protecting access to political participation and bolstering voter interest—are fundamental to our democracy and are broader and more compelling than the Court of Appeals may have assumed.

### A. Restoring Citizen Confidence in the Democratic System Is a Compelling State Interest

It is no surprise that, in reacting to the current lobbying and influence-peddling scandal in Washington, D.C., most voters believe that "there is widespread corruption in Washington" (58% "widespread" vs. 38% "limited", ABC News/Washington Post poll, Jan. 5-8, 2006) and that "most elected officials in Washington make policy decisions or take actions as a direct result of money they receive from major campaign contributors." (65% yes/21% no, FOX News/Opinion Dynamics, Jan. 10-11, 2006). Voters have expressed the view, in the past, that there should be a "fixed amount of money for election campaigns" and that "all private contributions from other sources should be prohibited." (65% good idea/27% poor idea, Gallup Poll, Oct. 1996).

Similarly, in enacting Act 64, the Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." Act 64, Finding (a)(4). The District Court in this case found that the trial record "overwhelmingly demonstrated that the Vermont public is suspicious about the effect

of big-money influence over politics and that voter apathy is on the rise." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). The District Court pointed to, among other things, polling finding that 74% of Vermont voters "feel that ordinary voters do not have enough influence over politics and government in Vermont." *Id.* at 469. And the District Court held that "[s]pending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*," including "'[p]reserving faith in our democracy,'" *id.* at 482-83, *quoting Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). The District Court concluded that, "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* at 483.

The Court of Appeals characterized this state interest as "avoiding corruption and the appearance thereof . . . ." *Landell*, 382 F.3d at 115, an interest which the Court in *Buckley* held did not, by itself, justify imposition of candidate expenditure limits. *Buckley*, 424 U.S. at 55. The *Buckley* Court found that the "interest in alleviating the corrupting influence of large contributions is served by the [law]'s contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Id.* Notwithstanding the Court of Appeals' characterization of Vermont's interest as being "anti-corruption" and "safeguarding its political process from such contributor dominance," *Landell*, 382 F.3d at 118-19, the real interest at stake here is *not* only in preventing the reality or appearance of "corruption"—that is, of undue influence of contributors purchased through the making of large contributions. Another, related but separate interest is in combating the perception that the need to raise and spend large amounts of private contributions—no matter how limited each individual contribution may be—naturally and inherently distorts the democratic process by forcing elected

officials to focus their time, attention, energy and priorities on those who can afford to make political contributions, at the expense of everyone else whose interests those elected officials are also supposed to be representing.

While this situation may not meet the traditional definition of "corruption," it has resulted in a loss of faith in the fairness of the electoral and political processes. This loss of faith is demonstrated by the kind of survey research considered by the District Court in this case and by lowered voter turnout and participation in the political process generally. As the Court of Appeals stated, the issue is the impact of "contributor dominance" on "the process for achieving accessibility and accountability of state officials and candidates. . . . The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system." *Id.* at 118-19. The achievement of such accessibility and accountability—and of public confidence that they exist—is a goal directly related to but different in nature than the aim of "alleviating the corrupting influence of large contributions" considered in *Buckley*, 424 U.S. at 55. It is difficult to imagine, however, a more compelling interest than restoring public faith in our democratic system.

### B. Enhancing the Relative Role of Political Parties Is a Compelling State Interest

In enacting Act 64, the Vermont Legislature found that "limiting campaign expenditures will . . . encourage the personal involvement of a large number of citizens in campaigns, . . . crucial to public confidence and the robust debate of issues." Act 64, Finding (a)(8), *quoted in Landell*, 118 F. Supp.2d at 468. An important aspect of this governmental interest, not explored either by the District Court or the Court of Appeals, is "protecting equal access to political participation" and "bolstering voter interest and engagement,"

*Landell*, 382 F.3d at 115, in the sense that, by limiting what candidates themselves can spend, candidate expenditure limits make expenditures by groups of ordinary citizens *more* significant and thus amplify the voices of the citizenry to which the candidates are supposed to be responsive. Such limits actually promote and enhance access to participation in the political process by ordinary citizens, acting both individually and in association with each other.

In particular, Act 64 enhances the role and power of political parties. To be sure, Act 64 treats political party committees like other contributors with respect to their ability to make monetary or in-kind contributions *to* candidates: a political party cannot contribute to a candidate, or make an expenditure coordinated with a candidate, of more than $200 for state representative, $300 for state senator or county office and $400 for statewide office. Vt. Stat. Ann. Tit. 17, §§ 2805(a)-(b). A political party expenditure that is coordinated with a candidate is deemed to be a "related campaign expenditure," which is treated in the same way as a contribution. *Id.* §§ 2809(c) & (d). However, under the Act, while *candidates* are limited in what they can spend, political parties are *not* so limited. To the contrary, parties can make two categories of unlimited expenditures that can significantly promote their platforms and help elect their candidates.

First, under Act 64, party committees can freely undertake spending to promote the party, its views and platform and its candidates generally, including voter registration, voter turnout efforts and generic communications promoting the party and its positions ("Vote Democrat") without referencing specific candidates. The Vermont Secretary of State has authoritatively interpreted the Act to mean that an expenditure by a political party that substantially benefits more than six candidates "and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure,"

Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses," § 3. The result of this interpretation is that such party expenditures are *not* treated as contributions, and are therefore unlimited.

Second, under Act 64 political parties are free to make unlimited independent expenditures on behalf of specific candidates. A party expenditure is treated as a "related campaign expenditure," and thus as a contribution subject to the Act's limits, only if it is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. Tit. 17 § 2809(c). If a party expenditure does not meet this definition, it is deemed to be independent, and *not* subject to any limit.[2]

Strengthening the role of parties, as Act 64 does, is in itself a compelling governmental interest. First, it has been widely recognized that strong political parties serve a vital role in our democracy, in particular, in giving voice to ordinary citizens in the political process and combating the undue influence of special interests. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic*

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[2] While section 2809(d) of the Act creates a rebuttable presumption that a party expenditure that "primarily benefits six or fewer candidates who are associated with the political party. . . is presumed to be a related expenditure," and thus subject to the contribution limits, that presumption has been interpreted by the Secretary of State to be rebuttable—that is, a party committee may establish that its expenditure was independent by presenting "evidence that the elements of the definition" of "related campaign expenditure" were not met. Administrative Rule 2000-1, § 3(d). In any event, the presumption provision in itself is not critical to achievement of Act 64's important purposes and, if necessary, is severable from the rest of the Act. Vt. Stat. Ann. Tit. 1 § 215; *see Landell*, 118 F. Supp. 2d at 492-93.

*Party v. Jones*, 530 U.S. 567, 574 (2000). "[P]olitical parties are the voluntary associations principally committed to making democracy work." Nancy L. Rosenblum, *Symposium: Law and Political Parties: Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000).

Because political parties "are bodies large enough to translate the people's will into action, they bridge the gap between the electors and the government, ensuring that the people have a voice." Clarisa Long, *Note: Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1175 (1994). As one commentator has noted:

> Parties perform at least four critical functions for American democracy. They promote a competitive electoral environment ("competitiveness"); they aggregate interest groups and minorities into electoral and policymaking coalitions ("representation"); they coordinate between officials in each branch and level of government ("governance"); and they sometimes behave like other types of political organizations that exist mainly to express members' policy positions and beliefs ("expression").

Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793 (2001). "Parties are a force of unification in the divided American policy system . . . .[T]hey bring people of diverse political views together; by providing a structure to bring divergent social and ideological groups together, parties limit the destructive impact of factionalism." Amanda G. Altman, *Note: Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v Colorado Republican Federal Campaign Committee*, 46 ST. LOUIS L.J. 1001, 1030 (2002).

Second, these functions have been undermined since *Buckley* as candidates have increasingly become individual entrepreneurs, able to raise and spend unlimited sums in their

own right, and less dependent on the parties. "[T]oday, even partisan candidates build and operate organizations largely independent of the state and national parties . . . . Candidates raise their own money. They hire their own contractors . . . ." Rosenblum, *supra*, 100 COLUM. L. REV. at 814. "Those candidates who reach Congress are more independent of party selection, support and discipline today than at any previous time in our history. . . .They now owe loyalty not to a party with a reasonably coherent view of the right mix of national policy, but to a variety of narrowly focused pressure groups with disparate and conflicting views." Lloyd Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 34 (1985). These "declines in party government and party loyalty . . . are of enormous current importance . . . .[T]they go far to explain the national disappointment in the effectiveness of Congress and of the national government . . . ." *Id.* at 27.

Act 64 thus helps restore the ability of party committees, at least in Vermont, to serve the critical functions of unification, giving voice to the views of voters and achieving better governance. Enhancing and restoring the role of political parties in this way should be regarded as an especially compelling governmental interest.

### C. Deference Should Be Accorded to the Decision of Vermont Legislators to Limit Their Own Spending Relative to That of Other Political Actors

While *Buckley* counseled against restricting "the speech of some elements of our society in order to enhance the relative voice of others," *Buckley*, 424 U.S. at 48-49, "those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ." *Nixon v. Shrink Missouri*

*Government PAC*, 528 U.S. 377, 402 (2000)(Breyer, J., concurring).

More critically, the *Buckley* language should, as a logical matter, be given far less weight when, as in this case, lawmakers are restricting their *own* campaign spending, rather than that of others. The Court has afforded deference generally to the determinations of legislators about the need for laws that regulate campaign finance, underscoring the need to "show[] proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 137 (2003). "[S]uch deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity . . . ." *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003).

In *McConnell*, for example, the Court upheld virtually all of the provisions of the Bipartisan Campaign Act of 2002 ("BCRA") even though that law sharply reduced the resources available to national and state political party committees, 2 U.S.C. § 441i, and outlawed much broadcast advertising criticizing Members of Congress, 2 U.S.C. §§ 434(f)(3), 441b(b)(2), while *increasing* the limits on contributions to the very Members of Congress who enacted the law. 2 U.S.C. § 441a(a). "We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . ." *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting).

If BCRA did not impermissibly "restrict the speech of some elements of our society in order to enhance the voice of others," *Buckley*, 424 U.S. at 48-49, then surely Act 64 does not. Far from restricting the voice of critics while enhancing their own, the Vermont legislators who enacted Act 64 did the opposite: they restricted *their own* spending, while enhancing the significance of the spending of *other* political

actors. Special deference should therefore be accorded to their judgments about the compelling need to impose such restrictions in the form of the candidate expenditure limitations.

In this regard, it is not true that Act 64's "limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents." *Landell*, 382 F.3d at 178 (Winter, J., dissenting). To be sure, as Judge Winter noted, "When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents." *Id.* at 158. Such motive and opportunity are not evident in this case, however.

First, the limits on candidate spending here are set at such affordable levels that there is little doubt that any serious challenger would be able to match the incumbent's spending—a situation that is an improvement over the typical circumstances faced by challengers. The trial record in this case included evidence that spending limits reduce the disparity between challenger and incumbent spending, and thus actually advantage *challengers*. *Landell*, 382 F.3d at 128. Second, unlike any other federal or state campaign finance law ever passed to our knowledge, Act 64 actually sets spending limits lower for incumbents than for challengers: incumbent candidates for statewide office can spend only 85% of the limit for challengers and incumbent candidates for the legislature can only spend 90%. Vt. Stat. Ann. Tit. 17 § 2805a(c). Finally, as discussed in section II(B), *supra*, the party committees are not limited in their spending on behalf of challengers, either through voter mobilization activities or through independent spending on behalf of specific challengers.

For these reasons, particular deference should be accorded to the judgment of the Vermont legislators who enacted Act 64, about the compelling need to impose candidate expenditure limitations.

## CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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